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Contents

Protection of the atmosphere (*continued*)

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Present:

Chairman:	Mr. Nolte
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Kolodkin
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10 a.m.

Protection of the atmosphere (agenda item 5) (*continued*) (A/CN.4/705)

Mr. Laraba said that the Special Rapporteur's fourth report was best considered in the light of the most important elements of his approach to the topic in his previous reports. For instance, the Special Rapporteur had highlighted the need to take an exclusively legal approach to the topic, and to avoid politicizing the debate. He had strongly emphasized the importance of considering the relevant legal principles and rules within the framework of general international law, and thus resist the tendency towards compartmentalization, or fragmentation, caused by the dominant "single-issue" approaches to international environmental law. In addition, he had warned against smuggling *lex ferenda* proposals and preferences into the interpretation of *lex lata*. He had also noted the significant gaps in existing law relating to the atmosphere. The natural temptation to fill them should be avoided; otherwise, there would be a heightened risk of a surreptitious move towards *lex ferenda* proposals — precisely what he had cautioned against.

Chapter I of the fourth report, on guiding principles of interrelationship, introduced the key concept of "mutual supportiveness", which was omnipresent in the report and at the heart of the four draft guidelines. Yet although the concept of "interrelationship" was introduced, there was no definition of the term, nor were any references provided for it. The postulate on which it was based appeared to be that, in specialized fields, there were significant gaps and overlaps in international treaties because little or nothing had been done to coordinate or harmonize them. However, there was plenty of evidence, in both treaties and legal writings, of complementarity, convergence, harmonization and mutually positive influences among international conventions. Of course, if the Special Rapporteur had referred to that evidence, it would have been very difficult, if not impossible, for him to justify the fundamental proposition set out in the report, namely mutual supportiveness. That proposition depended on the absence of complementarity and coordination and on the existence of conflicts between conventions. By talking only of "potential" conflicts, the Special Rapporteur was able to move on to a discussion of mutual supportiveness as a means of coordinating treaty provisions into coherent schemes for the protection of the atmosphere. Such mutual supportiveness seemed to belong to the realm of *lex ferenda*.

In paragraph 14, the Special Rapporteur raised the concept of mutual supportiveness to the level of an "indispensable principle of present-day international law when coping with issues of interpretation, fragmentation and competition among regimes", noting that the call for mutual supportiveness had become a recurrent expression in international instruments and judicial decisions. However, if it was indeed a general principle of international law, one would have expected references to some general international instruments. Instead, the report referred, without citing them, to some conventions dealing with specific branches of international law. The fact that a supposedly general principle was at best drawn from *lex specialis* demonstrated, more clearly than anything else, that mutual supportiveness was not an essential principle of general international law.

Meanwhile, the legal writings on mutual supportiveness cited by the Special Rapporteur dealt mainly with the relationship of the law on protection of the atmosphere with international environmental law and trade law. Many other studies on mutual supportiveness had led to different conclusions. He wished in particular to draw attention to a 2007 article in the *Revue générale de droit international public* by Laurence Boisson de Chazournes and Makane Moïse Mbengue on the principle of mutual supportiveness in relation to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity and the World Trade Organization (WTO) agreements, in which the authors had concluded that mutual supportiveness was a very flexible concept that could be formulated in many different ways.

For all those reasons, he had serious doubts about the content of draft guideline 9. Moreover, the points made by the Special Rapporteur himself in his first report (A/CN.4/667) on the risks of surreptitiously moving from *lex lata* to *lex ferenda* and the temptation to fill in the "gaps", remained pertinent, as did his warning that the Commission should resist the tendency towards compartmentalization or fragmentation.

As for the Special Rapporteur's decision to focus on the relationship of the law on the protection of the atmosphere with the law of the sea, international trade and investment law and international human rights law, he noted that the Special Rapporteur had referred in his second report (A/CN.4/681) to the generic "interrelationship with other relevant fields of international law", which suggested that the branches of law on which he focused were not the only branches that were relevant. It was unfortunate that the Special Rapporteur had not discussed his choices in that respect with the Commission.

In the section on the relationship with international trade law, the Special Rapporteur had needed to interpret the various international conventions cited in paragraphs 23 to 27 very broadly in order to corroborate the existence of the principle of mutual supportiveness. He seemed to think, for example, that the principle was contained in the first paragraph of the preamble of the Marrakesh Agreement Establishing the World Trade Organization, on the grounds that it was stated there that trade should be conducted "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development". The Agreement did not enshrine that principle; it simply called for States to draw up policies that encouraged mutual strengthening of trade and the environment. Nor was the fact that the WTO Committee on Trade and Environment had begun pursuing its activities "with the aim of making international trade and environmental policies mutually supportive" necessarily an affirmation of the principle of mutual supportiveness.

The Special Rapporteur's interpretation of multilateral environmental agreements was especially broad. Article 3 (5) of the United Nations Framework Convention on Climate Change, for example, encouraged States parties to cooperate in the promotion of a "supportive and open international economic system that would lead to sustainable economic growth", but that did not amount to an expression of the principle of mutual supportiveness. Moreover, there were no references to "mutual supportiveness" in the most recent major multilateral environmental agreement, the Paris Agreement.

With regard to the law of the sea too, the Special Rapporteur's claim that the regulation on atmospheric pollution from vessels under the United Nations Convention on the Law of the Sea incorporated "mutual supportiveness" rested on a broad and liberal interpretation of the text, which allowed the Special Rapporteur to consider certain language as pertaining to mutual supportiveness when it did not necessarily do so.

Lastly, with regard to international human rights law, he wished to draw attention to the report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/22/43). Paragraphs 58 and 62 of that report clearly illustrated the evolving nature of the relationship between human rights and the environment. According to the Independent Expert, many aspects of that relationship were still not well understood and, in seeking to clarify them, States should take account of all the decisions and recommendations from the many forums that were actively developing and implementing the human rights norms relevant to environmental protection. The principle of mutual supportiveness was not expressly cited in that report, but the notions of complementarity, coordination and harmonization were clearly implied. The conclusions and recommendations of the Independent Expert could perhaps offer a starting point for the reformulation of the draft articles proposed by the Special Rapporteur.

Mr. Rajput said that, while most other aspects of the environment were covered by international law, until now, there had been no dedicated focus on the atmosphere. The Special Rapporteur had successfully performed the daunting task of providing guidelines on what was an important and complicated area. While he understood that treatment of the topic was severely constrained by the 2013 understanding, the Special Rapporteur could respect those limitations and suggest ways of protecting the atmosphere through non-binding guidelines, since the atmosphere was physically distinguishable from other aspects of the environment, for which specialized branches of law had been developed in the past. The non-binding guidelines might contribute to the development of a new branch of law in the future, once there was adequate State practice to support it.

In his view, the Special Rapporteur's choice to examine the interrelationship with trade, investment, the law of the sea and human rights was appropriate, as those fields all

had inherent links with protection of the environment and thus also with the atmosphere. The connection between the atmosphere and those four areas arose in different situations. First, if a State adopted regulations on the protection of the atmosphere, they might interfere with private businesses, which could give rise to an investment claim being brought by a foreign investor that would suffer loss as a result. Secondly, if a State granted subsidies or other similar measures for the promotion of atmosphere-friendly technology, that could form the basis of a challenge at WTO as a trade-restrictive or trade-distortive measure. In the field of trade and investment, the draft guidelines could enable, rather than constrain, States to take action in future for the protection of the atmosphere. Thirdly, human activity on the sea was bound to affect the atmosphere, as there was a geographical connection and the potential for pollution. Lastly, there had already been litigation in municipal courts based on protection of the environment as a human right and the possibility of proceedings in relation to the protection of the atmosphere could not be ruled out. In the draft guidelines, a suggestion could be made that States should develop relevant regulations in the future. The reference to other areas of law should not create additional obligations for States; as the Special Rapporteur had noted, the proposed guidelines were merely hortatory and did not impose legal obligations of any kind.

The Special Rapporteur had rightly drawn attention to the real threat of fragmentation, which could not be lightly discarded. The potential for fragmentation was particularly acute in the fields of trade and investment, where there was a tendency to claim that they were distinct from general international law and ought to be treated separately. That was also reflected in some of the jurisprudence of WTO cited in the report. In the WTO context, the debate had mostly surrounded the interpretation of article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, a restrictive reading of which suggested that only rules of interpretation originating in customary law were relevant for dispute resolution. However, that view ignored the fact that WTO agreements were treaties and thus covered by the Vienna Convention on the Law of Treaties, article 31 (3) (c) of which performed the pivotal task of systemic integration. It was only in the *Shrimp/Turtle* case that the Appellate Body had gone beyond the narrow interpretation article 3 (2) of the Understanding and had adopted an approach based on article 31 (3) (c), supporting a greater role for international law in the interpretation of WTO obligations. He therefore agreed with the Special Rapporteur that there was a need for systemic integration of specific fields of international law with general international law.

He shared the reservations expressed by other members concerning the use of "mutual supportiveness" to achieve the goal of systemic integration, which they argued did not have any normative legal value, either in specialized fields such as trade and environmental law or in international law generally. The inappropriateness of the term "mutual supportiveness" did not mean that systemic integration could not happen. It ought to and could be achieved only through settled principles of treaty interpretation, codified in the Vienna Convention and existing in customary law. He proposed that the Special Rapporteur should reconsider the use of the term "mutual supportiveness" and in its place use "harmonization", the importance of which had been emphasized in paragraphs 37 to 43 of the report by the Commission's Study Group on the fragmentation of international law.

The focus must be on the avoidance of conflict between two norms, and that could be achieved through harmonious interpretation. The two norms that were to be harmonized must have the same normative value, as any attempt to harmonize an already settled binding norm with one that was not might undermine the value of the pre-existing norm. According to subparagraph (d) of the 2013 understanding, the "outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein". Therefore, the outcome of the Commission's work in itself could not result in conflict with other obligations in the fields identified as having potential for conflict. However, such a possibility could not be ruled out in the future, as it was not known if and when such obligations might be established at the international level, through a treaty or otherwise. For example, it was possible that States might adopt municipal regulations for the protection of the atmosphere, in which case conflict with obligations under the specialized fields might arise. The regulations thus adopted by States could not be discarded simply as national laws and therefore subservient to treaty obligations, as they would fall within the rubric of regulatory freedom of States in

international law, which was a right under customary international law. There was adequate State practice to establish that, if a State adopted a legitimate regulation that satisfied the requirements of being *bona fide*, non-discriminatory and in the public interest, it would be a customary norm. Thus, such a legitimate regulatory exercise would have to be harmonized with obligations under treaties in specialized fields. Therefore, a provision based on harmonization would enable States to undertake regulatory measures for the protection of the atmosphere.

There were two problems with draft guideline 10 as currently worded. It urged States to take appropriate measures in the fields of trade and investment law to protect the atmosphere. While that was a laudatory suggestion, with current state of negotiations at WTO such a provision would be ineffective. It would be preferable to make a proposal that gave due credence to the need for protection of the atmosphere in the trade and investment context. The standard of regulation contemplated in draft guideline 10 — "shall not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade or foreign investment" — would create a provision incompatible with article XX of the General Agreement on Trade and Tariffs and the regulatory freedom of States in general international law.

Similar issues arose in relation to draft guideline 11 on the law of the sea. There was no obligation to protect the atmosphere arising from the Convention on the Law of the Sea, but the need for harmonization might arise once a regulation on protection of the atmosphere was introduced that related to activities on the sea. For example, if a coastal State made a regulation limiting the use of a particular shipping technology or added a tax on the use of such technology for protection of the atmosphere, it would be applied to ships passing through the territorial sea, in which case there could be a conflict and harmonization would be required. The problems faced by small island States and low-lying States were indeed pressing and disturbing, but they applied to all coastal States due to receding coastlines. The topic of sea level rise was extremely complex and should be dealt with rigorously and not in a summary fashion. He supported the proposal by some members that the Commission should incorporate the topic in its long-term programme of work.

The Special Rapporteur on human rights and the environment was exploring the relationship between those two fields in detail, and it was also being dealt with by municipal courts; he therefore did not believe there was any need for it to be addressed in a draft guideline. He supported the general view that had emerged in the course of the debate that the draft guidelines should be merged. It could simply be noted in the redrafted guideline that there should be harmonization in situations where States adopted national regulations for the protection of the atmosphere in relation to the fields of trade, investment and the law of the sea. The rules of conflict resolution already existed in general international law, and the conclusions in the Commission's report on the fragmentation of international law would adequately cover any future potential conflicts. If the methods of conflict resolution were detailed in the draft guideline, it might create problems owing to differences in treaty texts. The extent of regulatory freedom exercisable through WTO regulations was narrower than that in investment treaties. Article XX of the General Agreement on Trade and Tariffs, which broadly limited regulatory freedom, set out the conditions under which there would be exceptions to obligations under WTO regulations. There were no equivalent limitations in investment treaties, thus States had considerable discretion, although investment tribunals had not been consistent in acknowledging and applying it. Therefore, a specific reference to trade and investment was indispensable. He proposed that the new draft guideline should read: "In the event that States agree to enter into a treaty relating to protection of the atmosphere or adopt legitimate national regulations for the protection of the atmosphere, the obligations under trade and investment law and the law of the sea should be harmoniously interpreted along with the measures undertaken for the protection of the atmosphere."

In conclusion, he said that there could be no disagreement with the Special Rapporteur's objectives, only with his methodology. He therefore supported referring all the draft guidelines to the Drafting Committee.

Mr. Saboia said that the meeting with scientific experts organized by the Special Rapporteur had been very useful. There had been ample criticism by other members, much

of it justified, of the methodology of the fourth report and certain inconsistencies among the concepts therein. However, he believed that the report had value and contained valid thoughts and references regarding the need to take a systemic and integrative approach to rules of international law so as to avoid fragmentation and resolve conflicts with a view to promoting harmonization. The report tried to reflect the conclusions and recommendations of the Study Group on the fragmentation of international law in the consideration of the relationship between rules on protection of the atmosphere and other spheres of international law. There had been criticism of the chosen fields of trade and investment law, the law of the sea and human rights. However, it was difficult to deny the close relationship between economic activities and environmental problems, including protection of the atmosphere. The concept of sustainable development had originated in order to reconcile the needs of development with those of environmental protection. Little attention had been paid during the debate to the important shift in the WTO position regarding the relationship between international trade law and environmental protection with the aim of making them mutually supportive in order to promote sustainable development. The establishment of the Committee on Trade and Environment was one indicator of the increased importance being given to environmental issues in WTO. Although WTO might not have changed as much as the Special Rapporteur seemed to imply, the shift in dispute settlement procedures, of which the Appellate Body decision in the *Gasoline* case was an example, nonetheless seemed noteworthy. The Appellate Body had made a firm statement on the need to respect and take into account general international law, customary international law and the Vienna Convention in interpreting rules of international trade.

Regarding the chapter on the interrelationship with the law of the sea, it had been rightly pointed out that the issues addressed in draft guideline 11 (2) — the impact of sea level rise on small island States and low-lying States — fell outside the scope of the topic. Nevertheless, most speakers had stressed that those were issues of great concern, and he endorsed the proposal to cover them under a separate topic in the Commission's long-term programme of work. He recommended that the report on the work of the Commission at its sixty-ninth session should contain clear references to that part of the debate so that States could take it up in the Sixth Committee.

On the interrelationship between protection of the environment and human rights, the Special Rapporteur had succeeded in showing how international human rights bodies, such as the Inter-American Commission on Human Rights, had incorporated the concept that a healthy environment was a precondition for the guarantee of some of the core human rights. A section of the report also provided important information on assessments by different organizations of the impact of environmental harm and atmospheric degradation on vulnerable groups. One of the most challenging problems concerning the interrelationship between human rights law and the norms relating to the environment and protection of the atmosphere was that of extra-jurisdictional application, covered in paragraphs 89 to 91 of the report, which had been scarcely touched upon in the debate. The Special Rapporteur suggested that cases in which an environmentally harmful activity by one State infringed on the right of a person in another State could be dealt with by applying the principle of non-discrimination or invoking the object and purpose of the treaty. It was worth noting that, in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice had stated that: "While the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions."

Although the concept of mutual supportiveness could not be considered a legal principle, it provided a useful tool for attempting to harmonize different areas of international law and resolve questions of interpretation and conflict. It could contribute to the integrated and systemic approach suggested by the Study Group on the fragmentation of international law to address the challenge of the proliferation of different areas of international law. In conclusion, he expressed support for the proposal to refer the draft guidelines to the Drafting Committee with the recommendation that they should be consolidated into one or two draft guidelines.

Mr. Ouazzani Chahdi said that, in reading the report, he had wondered what added value the Commission's work on the topic might bring to the international community beyond the provisions of existing international agreements, particularly the Paris Agreement, when it came to developing the "law of the atmosphere". Several delegations in the Sixth Committee had raised the same question. In addressing the issue, the Special Rapporteur relied on the Commission's work on the topics of fragmentation and interrelationship, and had structured the report around the concept of mutual supportiveness and harmonization. However, mutual supportiveness was more of a methodological approach than an "indispensable principle" of international law, as claimed by the Special Rapporteur in paragraph 14 of the report. In his view, further clarification of the concept was required; the fact that it had first appeared in Agenda 21, adopted by the United Nations Conference on Environment and Development in 1992, did not mean that it should be established as a principle of international law. Furthermore, what might be referred to as the "law of the atmosphere" had not yet acquired the status of an autonomous regime, as the Special Rapporteur asserted in paragraph 8, although he had rightly qualified that it was "in no way a 'self-contained' or 'sealed' regime".

With regard to the interrelationship between the protection of the atmosphere and other branches of international law, he agreed that it was necessary to properly justify the choice of fields, as others, such as aviation law or the law related to nuclear testing, could have been included. International trade law and investment law, however, were subjects far removed from the topic. With regard to the latter, in addition to the rights of States, it was also necessary to take account of the legitimate rights of investors, which included fair and equitable treatment and compensation in the event of expropriation, as discussed by the Special Rapporteur in the report. In the absence of an international multilateral agreement on investment guarantees, foreign direct investment was regulated by bilateral investment agreements, not all of which addressed environmental matters. Furthermore, the report referred primarily to reciprocal investment agreements, whereas States sometimes concluded non-reciprocal agreements in order to attract higher investment in their territory and, in such cases, paid little attention to environmental matters.

With regard to the interrelationship between protection of the atmosphere and the law of the sea, he thanked the Special Rapporteur for having organized the briefing with scientific experts. However, he shared the view that the problem was particularly pollution from land-based sources, which emanated from fossil-fuel and waste emissions released into the atmosphere. For that reason, the pollution from vessels addressed by the Special Rapporteur in paragraph 56 of the report was of little relevance to the topic. He agreed with others that the technical issue of sea level rise was not entirely relevant to the topic.

The section of the report on the relationship between protection of the atmosphere and international human rights law was interesting, but he wondered whether reference should not also be made to humanitarian law. Perhaps the analysis of the interrelationship of protection of the atmosphere with other branches of international law should be limited to international environmental law, the law of the sea and human rights and humanitarian law. In general, the draft guidelines lacked consistency. Regardless of how draft guideline 9 was reformulated, further clarification was required, particularly with regard to harmonization and mutual supportiveness. In draft guideline 11 (2), the problem of se level rise did not only concern small island States and low-lying States but also coastal States. Paragraph 3 of draft guideline 12 should be moved to draft guideline 11, which also dealt with the sea. The question of whether or not to merge the draft guidelines into a single draft guideline should be left to the Drafting Committee. He agreed that the reference to future generations was a political statement rather than a legal one and was therefore out of place in the draft guidelines. He had no objection to referring the draft guidelines to the Drafting Committee.

The Chairman, speaking as a member of the Commission, said that, when he had read the report for the first time, he had done so through the eyes of a reader seeking only to grasp the essence of the message that it conveyed. He had been impressed by the ecological and humanistic ethos, which had led the Special Rapporteur to take an integrative approach to the topic, as well as by the rich collection of relevant sources, including judicial and

State practice, on the basis of which the Special Rapporteur had formulated a conceptually ambitious proposal.

When he had read the report for a second time, through the critical eyes of a lawyer who was sensitive to the details, he had thought that he would have expressed a number of points, and interpreted a number of sources, differently. In particular, he was not as confident as the Special Rapporteur that the law contained, or even should contain, a general principle in favour of the protection of the atmosphere.

Upon listening to other speakers during the debate, he had been reminded of his second reading experience. Many of the criticisms that they had made were, in his opinion, justified. Several members had rightly emphasized that the report did not sufficiently reflect the primacy of specific rules, the possibility of conflict between rules or the great number of ways in which certain rules might relate to one another. Reservations had also been expressed with regard to accepting, wholesale, a general principle of mutual supportiveness that would determine the relationship between rules from different areas of international law. He agreed that the Commission could and should not speak of "principles" in the context in question.

That there were justified criticisms of the report should not, however, detract from the basic element that had informed the Special Rapporteur's approach, even though the Special Rapporteur had arguably taken that approach too far. The report addressed and established an important point with regard to which the Commission should remain open-minded, a point that was dealt with in articles 30 and 31 (3) (c) of the Vienna Convention on the Law of Treaties.

He proposed that those provisions of the Vienna Convention should serve as the basis for the Commission's work. They laid down rules that were well established, including as customary international law, and had been elucidated and illustrated by later treaties, State practice and the work of the Commission itself. The rules applied in all areas of international law and with respect to all treaties. It would be sufficient, and even prudent, for the Commission to limit itself to elaborating on those rules by referring to the materials provided by the Special Rapporteur in the report and the examples cited by many of the previous speakers.

That approach would not require the Commission to adopt more than one draft guideline. The most important question was whether, and to what extent, the concept of mutual supportiveness should be included. The concept had drawn a lot of criticism during the debate, but that appeared to have more to do with the Special Rapporteur's attempt to push it too far, in particular by declaring it to be a "principle" of international law.

Mutual supportiveness, as an approach to interpretation, was already contained in the rules of the Vienna Convention, in customary international law and in certain relevant areas of international law. The approach neither modified those rules nor prevailed over them; rather, it elaborated on and enriched them.

"Mutual supportiveness" had become a widely accepted expression for the need to reconcile and harmonize two or more rules of international law that were binding on two or more States. It was found, for example in, article 20 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

In his opinion, it was not circular reasoning to view references to mutual supportiveness in treaties as a sign of general recognition. The many references to mutual supportiveness expressed a conviction that treaties should, as far as possible, be interpreted in the light of other rules that were binding on the parties and interpreted and applied in an integrative manner. Mutual supportiveness essentially illustrated, and gave life to, what the Vienna Convention and the Commission's report on the fragmentation of international law described in drier terms. It was a way of saying that States should interpret and apply two or more rules that were binding on them by giving them appropriate weight in relation to each other, which was the formulation that the Commission had used in its work on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of

treaties". While it was not particularly important whether that approach was labelled "harmonization", "proportionality" or "mutual supportiveness", he favoured the last option for two reasons. First, it was accepted in more than one area of international law. Secondly, it reminded those who interpreted and applied laws to look at the object and purpose of the rules contained therein with a view to realizing them as fully as possible and to finding a sensible delineation between two or more norms. It was, of course, important for the mutual supportiveness approach not to impose an interpretation on a State that was bound by only one of two or more rules.

For the reasons that he had set out, he believed that the Commission should not dismiss the concept of mutual supportiveness prematurely. Instead, it should consider integrating the concept in a general draft guideline on the relationship between rules relating to the protection of the atmosphere and other rules of international law.

However, such a guideline should distinguish between the interpretation and application of rules, on the one hand, and their creation or formation, on the other. The former category related to legal processes, while the latter, which the Special Rapporteur called the "development" of international law, involved a political process. He therefore proposed dealing separately with the issue of what States should do when creating or forming new rules of international law.

On the basis of those considerations, he proposed a revised version of draft guideline 9, which would be entitled "Relationship between rules relating to the protection of the atmosphere and other rules of international law" and would read:

"1. When interpreting and applying rules of international law, States shall:

(a) take into account, as far as possible in a harmonious and mutually supportive manner, any relevant rules relating to the atmosphere and other rules of international law applicable in the relations between the parties in accordance with article 31 (3) (c) of the Vienna Convention on the Law of Treaties; and

(b) determine, in accordance with article 30 of the Vienna Convention on the Law of Treaties, whether rules relating to the atmosphere and other rules of international law are in conflict.

2. States should aim to prevent and to resolve conflicts between rules relating to the atmosphere and other rules of international law by appropriate means."

Mr. Murase (Special Rapporteur), summarizing the debate on the fourth report on the protection of the atmosphere (A/CN.4/705) said that he appreciated the many helpful comments, suggestions and criticisms made by members. He would begin by touching on a few general issues, before responding to observations about specific draft guidelines.

He was grateful to all the members who had attended the informal meeting with scientists and experts and was happy to note that many had found the dialogue useful. A summary of the meeting would be uploaded to the Commission's website in the near future.

A range of opinions had been expressed with regard to the 2013 understanding, with which he had complied and to which he remained faithful. Mr. Murphy and Sir Michael Wood had condemned his reference to common but differentiated responsibilities in paragraph 59 of the report, arguing that the matter was excluded by the understanding. What they had conveniently ignored, however, was that the understanding established that "the topic will not deal with, but is also without prejudice to, questions such as … common but differentiated responsibilities". The "without prejudice" clause had been inserted by a member of the small group that had drafted the understanding on the grounds that developing countries would not have supported the topic if the principle of common but differentiated responsibilities had been unequivocally excluded. A reference to the principle had therefore been considered a necessary element of the understanding, and he had felt duty-bound, as Special Rapporteur, to respect the understanding, which was why he had discussed the principle in detail in his third report and mentioned it again in his fourth. He would continue to "not deal with" it by not including it in specific draft guidelines or seeking to build upon it in any way, and would instead merely reference it where appropriate and in accordance with relevant international law.

The Sixth Committee had approved the topic in 2011 without any conditions, and several members of the Commission had expressed sympathy with him for having to work under the restrictions imposed by the understanding. Mr. Tladi had suggested that the understanding could be revisited, but he personally thought that it was too late to do so, and would continue to abide by the understanding during the preparation of his fifth and final substantive report. Regardless of the constraints imposed on him, he would not have agreed to address the topic unless he had been sure that he could do so successfully and comprehensively. His conviction in that regard had not changed, and he was thankful to the members of the Commission for their continued support. That being said, restrictions had never before been placed on a Special Rapporteur in the form of an understanding in the long history of the Commission, and there should be no repeat of the situation. As stated by a former member of the Commission, the understanding was "disgraceful", not to mention "humiliating" for the Special Rapporteur. The debate on the topic had, at times, been divided, focusing not only on substantive issues but also on elements of the understanding. In his opinion, that was something that should be avoided in future.

Regarding the terms "law of the atmosphere", "autonomous regime" and "special regime of international law", the point made in the report was that the law relating to the protection of the atmosphere was not a "sealed" or "autonomous" regime. Instead, it existed and functioned only through its interrelationship with other branches of law.

He had been surprised to hear Mr. Murphy state that, at the Commission's sixty-eighth session, he had voiced his opposition to dealing with the issue of interrelationship. He personally did not recall that remark, and, indeed, had decided to devote a chapter of the report to the issue partly because, in 2012, Mr. Murphy had asked whether he was capable of tackling the intricate problem of the relationship between trade and the environment.

When exploring the issue of interrelationship, he had selected three areas of law, namely trade and investment law, the law of the sea and human rights law, because of the close links that they shared with the law relating to the protection of the atmosphere in terms of treaty provisions and jurisprudence. Those links had been recognized in, *inter alia*, textbooks on international environmental law and the International Law Association's 2014 draft articles on legal principles relating to climate change.

He had also considered the law of biodiversity, but had been unable to find any comparable close links. The "biosphere" was a much broader concept than the "atmosphere" and would have unduly expanded the scope of the topic. It had been suggested that the law of armed conflict and air and space law should also have been studied. The former was already mentioned in the commentary to draft guideline 7 — which provided that the draft guideline applied only to "non-military" activities — and bore insufficient relation to other parts of the draft guidelines. The latter, meanwhile, had been dismissed as irrelevant to the topic during discussions on draft guideline 2 (4).

He therefore believed that the three areas of law selected were appropriate. That did not mean, however, that other areas were not also relevant, which was why he considered draft guideline 9 to be useful as a general rule that covered other areas or situations in which a conflict of norms might arise. Given that the term "interrelationship" was used as a descriptive notion throughout the report, it had been a mistake to speak of "the principle of interrelationship" in draft guideline 9. The reference should instead have been to "the principles on interrelationship".

He did not agree that the concept of mutual supportiveness had no normative value or status. Since it had been widely accepted in relevant treaty provisions and jurisprudence, it was fair to say that, at least in the context of trade and investment, it had acquired the status of a "subsidiary means for the determination of rules of law", in the sense of article 38 (1) (d) of the Statute of the International Court of Justice. Mr. Saboia had mentioned that, even if mutual supportiveness was not recognized as a legal principle, it provided a useful tool for harmonizing different areas of international law, while Mr. Nolte had stated that some elements of mutual supportiveness should not be dismissed. He agreed that it was not appropriate to use the term "mutual supportiveness" in relation to all the issues dealt with in the report. In the contexts of the law of the sea and human rights law, the expression "in a harmonious manner" seemed preferable. The expression "systemic integration", which had

been proposed by some members, was also suitable. Mutual supportiveness had been incorporated as a legal principle in the International Law Association's draft articles on legal principles relating to climate change, which were the fruit of six years of collective hard work by 33 leading academics from 17 different countries.

In that connection, some members had raised, either directly or indirectly, an important question of methodology. He believed that the Commission's work should be guided by its Statute, article 15 of which provided that, for the purposes of "codification", the Commission should examine "State practice, precedent and doctrine". It was regrettable that, in recent years, there had been a tendency, in the work of the Commission, to undervalue doctrine and academic contributions, a point that he had also made in relation to other topics. He was happy to note that many members had based their arguments and suggestions on relevant writings, from which he had greatly benefited.

Many members had suggested that the four proposed draft guidelines should be merged into one, but he had doubts about whether the important issues raised therein could be appropriately addressed in a single guideline. One proposal had been to enumerate the three areas of law discussed in proposed draft guidelines 10 to 12, which did not make sense, in his opinion, as it would invite more questions and might constitute an obstacle to the provision of sufficiently detailed commentaries on each area of law. Another proposal had been to have two guidelines, which would be better than one, but would not overcome the problem of having a simple enumeration of areas of law that deserved greater consideration. However, since the majority of members were in favour of having a single guideline, he had drafted one comprising four simplified paragraphs. He expressed the hope that the Drafting Committee would reach a consensus on the number of guidelines and paragraphs, and would be flexible in that regard, as he had been in the past.

He endorsed the suggestion that the title of draft guideline 9 should be changed, and proposed "Interrelationship" instead. Some members had stated that the report was unclear regarding the relationship between the proposed draft guidelines and certain articles of the Vienna Convention. It was, of course, not his intention to rewrite or go beyond the Vienna Convention; rather, the purpose of the report was to shed light on the relevance of articles 30 and 31 (3) (c) of the Vienna Convention in coping with the issue of conflicting treaties. Like a number of other members, he believed that it was important to refer to those two provisions in the draft guideline.

A concern had been expressed that the word "develop" in the expression "develop, interpret and apply rules of international law" might be interpreted as imposing an obligation on States to legislate, but that had not been his intention. However, he shared the view that the development of rules of international law should be treated slightly differently to their interpretation and application. The words "avoiding" and "preventing", as alternatives to "resolving" conflict, were both acceptable to him. The issue of cooperation was not mentioned as it had already been dealt with in draft guideline 8. The words "good faith", which he had proposed to insert in the past, did not feature as Sir Michael Wood had always opposed such an addition because, in his view, it was to be assumed that the concept of good faith would be applied to all the draft guidelines.

Although the proposal by Mr. Aurescu to qualify the phrase "other relevant rules of international law" with the words "to which they may have a direct link" was a good one, the idea was already implicitly conveyed by the word "relevant". Clarifications could be provided in the commentary, if necessary. He was grateful to Mr. Aurescu, whose proposed rewording of draft guideline 9 had been supported by many members and had served as a template for his own proposal. Likewise, he was grateful to Mr. Nolte for his proposal for a new draft guideline that focused on articles 30 and 31 (3) (c) of the Vienna Convention.

On the basis of those considerations, he had revised draft guideline 9, and proposed that it should appear as draft guideline 9 (1). The new text would read:

"**Draft guideline 9: Interrelationship**

1. In conformity with the relevant rules on the interpretation of treaties provided by the Vienna Convention on the Law of Treaties, especially articles 30 and 31 (3) (c), and the rules of customary international law on the matter, States are called to

> develop, interpret and apply the international law rules relating to the protection of the atmosphere by using the method of systemic integration and the principle of harmonization in relation with other relevant rules of international law, with a view to preventing or resolving conflicts between these rules, if such conflicts arise, for the purpose of ensuring an effective protection of the atmosphere."

Regarding draft guideline 10, several members had pointed out the ambiguity of its wording, including the words "appropriate measures". Several other members had also pointed out that the citation from the *chapeau* of article XX of the General Agreement on Tariffs and Trade might give the impression that the draft guideline served to justify the domination of free trade interests over environmental concerns, which had not been his intention. On the contrary, his intention had been to place both interests on an equal footing, and then try to reconcile them in a mutually supportive manner. It would thus probably be desirable to address that proposition concerning equal footing at the beginning of the draft guideline.

The concept of mutual supportiveness seemed to be well settled in trade law, and, perhaps to a slightly lesser degree, in investment law. One member had described the concept as an aspiration short of a legal principle, in some of the free trade agreements to which he had referred. In his view, the concept of mutual supportiveness could still be employed in the context of trade and investment as a tool for coordination and interpretation. It had been encouraging to hear about recent arbitral decisions in the field of investment law, which echoed the statement from the *Gasoline* case, "not to be read in clinical isolation from public international law". That might warrant a reference to systemic integration as well as to mutual supportiveness in the draft guideline.

He had thus revised draft guideline 10 accordingly and proposed that it should appear as draft guideline 9 (2). The new text would read:

> "2. Bearing in mind the importance of reconciling the interests of trade and investment, on the one hand, and those for protection of the atmosphere on the other, States should develop, interpret and apply relevant rules of international trade and investment law and relevant rules of international law relating to the protection of the atmosphere in a mutually supportive and integral manner."

In connection with draft guideline 11, on the law of the sea, several members had wondered whether the intent of the fourth report was to address marine pollution. That was certainly not the case. The focus of the report was that there were close linkages between the atmosphere and the oceans that should be borne in mind, and that were reflected in the Convention on the Law of the Sea and related instruments. He was certainly not proposing the establishment of a new law on marine pollution.

Most of the causes of marine pollution were land-based pollution, some of which reached the oceans from or through the atmosphere. In that sense, the relationship between the atmosphere and the oceans was unilateral, because human activities on the oceans that polluted the atmosphere were limited. Greenhouse gas emissions from ships were not the main source of climate change, as one member had asserted, but one of the main sources of climate change. He was not sure to what extent platforms for oil and gas drilling were responsible for polluting the atmosphere, although they undoubtedly posed a serious problem for marine pollution.

Draft guideline 11 (2), on the issue of sea level rise, had been added to reflect the strong desire of the small island States expressed over the years in the Sixth Committee. There were around 40 small island States that were States Members of the United Nations, some of which were seriously affected by sea level rise. He agreed with the many members who had indicated that the issue of sea level rise should be treated as a separate topic. However, in the absence of any relevant treaty practice, it was difficult to foresee how the subject would come under the Commission's normal mandate of codification and progressive development of international law. The topic could be taken up by the Commission if a request was received from the General Assembly or under the procedure laid down in article 17 of the Commission's Statute.

In any event, it would be some time before any law-making exercise on the sea level rise could be started either by the Commission or by another competent organ. He therefore urged the Commission to agree to retain a provision on the sea level rise, at least in the preamble to the draft guidelines, so as to send a message to the international community that the Commission was genuinely concerned by the important issue. As one member had cautioned, the issue did not concern only the delimitation of baselines, but also the loss of land and the potential loss of Statehood in some extreme cases, resulting in climate refugees and mass migration.

Several members had asked why the matter should be limited to small island States and low-lying States, as any coastal State could be affected by the rising sea level. Nevertheless, he agreed with those who feared that broadening the scope of the provision might lower the level of attention to the most vulnerable and seriously affected group of States. Based on those considerations, he had revised the two paragraphs in draft guideline 11, and proposed that they should appear as draft guideline 9 (3) and the fifth preambular paragraph, respectively. The new texts would read:

> "3. Recognizing the close interaction between the atmosphere and the oceans, States should interpret and apply relevant rules of the law of the sea and relevant rules relating to the protection of the atmosphere in a harmonious manner."

> "**Fifth preambular paragraph**

> "*Also aware* of the situation of small island and low-lying States with regard to the baselines for the delimitation of their maritime zones, potential loss of Statehood in some extreme cases and the protection of the affected people including migration,".

With regard to draft guideline 12, doubts had been expressed about the relevance to the topic of the interrelationship of the law on the protection of the atmosphere with human rights law. He endorsed the suggestion that if the intention was to remind States to take human rights norms into account when "developing, interpreting and applying the rules and recommendations relevant to the protection of the atmosphere", the provision could be reformulated to make that clearer. It had been recommended that the draft guideline should provide more concrete conditions for international human rights law to be applicable to the protection of atmosphere, which, in his view, should be reflected in the commentary to the draft guideline. Other points to be reflected in the commentary suggested were: the rights of indigenous people in the light of the jurisprudence of regional courts and bodies; the fact that the most challenging problem to the interrelationship between human rights law and the protection of the atmosphere was extra-jurisdictional application and that the International Court of Justice's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was relevant in that regard.

Concerning draft guideline 12 (1), it had been suggested that, the words "make best efforts" should be deleted and that the word "view" should be replaced with the word "purpose". With regard to draft guideline 12 (2), one member had said that he was in favour of a formulation that placed emphasis on vulnerable people and those in small islands, but had questioned whether the draft guideline was the best place to tackle those issues; while another member had observed that it seemed to be useful as a matter of policy objective and progressive development of international law. It had been pointed out that human rights were vested in individuals, not groups of people, and thus the wording "the human rights of persons belonging to vulnerable groups" had been suggested, which he endorsed.

He did not agree that draft guideline 12 (4) was not necessary because the interests of future generations were covered by draft guideline 6. That provision dealt with the utilization of the atmosphere, and was not, at least directly, concerned with human rights. One member had expressed concern about the standing of persons to bring human rights claims on behalf of future generations, which was precisely why he had used the term "interests" of future generations, instead of "rights". He did not endorse the suggestion to move the whole text of the draft guideline to the preamble. Instead, he had revised the text of draft guideline 12 and proposed that it should appear as draft guideline 9 (4) and the sixth preambular paragraph respectively. The new texts would read:

"4. States should develop, interpret and apply relevant rules of international human-rights law in a harmonious manner with rules of international law relating to the protection of the atmosphere. States should give particular consideration to the human rights of persons belonging to vulnerable groups, including indigenous people, people of the least developed developing States and people of small island and low-lying States, and women, children and the elderly as well as persons with disabilities."

"**Sixth preambular paragraph**

Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,".

With regard to his future work, he did not consider that the suggestion of organizing an informal working group or consultations was helpful. At the present juncture, he had only preliminary ideas about his fifth report. It was not the Commission's practice to control the content of the Special Rapporteur's report before it was drafted. Members could criticize or support the report when it was presented to the Commission. He already had sufficient restrictions under the 2013 understanding, and would appreciate it if members continued to place their confidence in him, as Special Rapporteur, for the final phase of the project. He had tried his best to respond to the concerns and incorporate the suggestions made. Most members seemed to be in favour of referring all the draft guidelines in the fourth report to the Drafting Committee, on the understanding that they would be simplified and merged. He therefore recommended that the Commission refer to the Drafting Committee the four draft guidelines in the fourth report, on the understanding that they would be consolidated into one draft guideline, with four substantially simplified paragraphs, and two draft preambular paragraphs, as he had read out.

The Chairman said he would take it that the Commission wished to refer to the Drafting Committee all the draft guidelines proposed in the fourth report, as well as the revised version of draft guideline 9 and the draft preambular paragraphs proposed by the Special Rapporteur, taking into account all the comments made during the debate.

Mr. Park said that he objected to the referral to the Drafting Committee of the fifth preambular paragraph proposed by the Special Rapporteur. There should be a close relationship between the contents of the draft guidelines and the preamble, which was not the case for the draft fifth preambular paragraph. Issues such as potential loss of statehood and migration of the affected people as a result of the sea level rise were serious, but the draft guidelines did not propose any concrete solution.

Mr. Valencia Ospina said he supported the idea that the new texts proposed by the Special Rapporteur should be referred to Drafting Committee, on the understanding that they would not override the proposals made by members of the Commission during the debate — they should also be taken into account by the Drafting Committee.

Ms. Oral said that she appreciated the Special Rapporteur's efforts to take into account all the comments made by members of the Commission and to condense the four draft guidelines into one. She supported the referral to the Drafting Committee of all the draft guidelines, including the revised version of draft guideline 9 proposed by the Special Rapporteur. She understood Mr. Park's concern about the need to refer to sea level rise in a draft guideline, since she had had similar concerns. However, in view of the clarifications provided by the Special Rapporteur, she suggested that it could be left to the Drafting Committee to fine-tune the language of the relevant text to accommodate those concerns.

Mr. Hmoud said that he was in favour of referring the revised text of draft guideline 9 and the two draft preambular paragraphs proposed by the Special Rapporteur to the Drafting Committee. Like Mr. Park, he had some issues with the texts as currently worded, but considered that they could be resolved in the Drafting Committee.

Mr. Cissé said that he had no difficulty with the referral of the fifth preambular paragraph to the Drafting Committee, as the concern he had had relating to the States affected was covered in the text of the paragraph.

Sir Michael Wood, after thanking the Special Rapporteur for trying to accommodate all views expressed, said he agreed that all the draft guidelines and the proposals discussed in plenary session, including the new texts proposed by the Special Rapporteur, should be referred to the Drafting Committee. As always, when proposals were referred to the Drafting Committee one could not be sure what the outcome would be. So, in his view, the Commission was not deciding at the present stage whether there would be four draft guidelines or one draft guideline and two additional draft preambular paragraphs.

Ms. Escobar Hernandez said that, first, she wished to express her appreciation to the Special Rapporteur for his efforts to reflect all the comments made during the plenary debate, in recognition of the Commission's collegiate approach to its work. Secondly, and, in her view, more importantly, the Special Rapporteur could simply have presented his proposal for new texts at the Drafting Committee stage; yet, in the interests of transparency, he had presented them in plenary session before their referral to the Drafting Committee. She further recalled that, in accordance with established practice, the referral of original or alternative proposals to the Drafting Committee should be at the Special Rapporteur's initiative, although the Drafting Committee should take into account all the comments and proposals made by other members too. She was therefore in favour of referring all the texts proposed to the Drafting Committee for consideration.

Mr. Murase (Special Rapporteur) said he agreed that all four draft guidelines should be referred to the Drafting Committee, on the understanding that his proposal for a revised version of draft guideline 9 and two draft preambular paragraphs as well as all other proposals made would be considered by the Drafting Committee. He had presented his proposals for new texts in the light of the request of Sir Michael Wood and other members to present them in plenary session.

The Chairman said he would take it that the Commission wished to refer to the Drafting Committee all the draft guidelines proposed in the fourth report, on the understanding that the Special Rapporteur's proposal to have one consolidated draft guideline 9 and two draft preambular paragraphs, as well as all the comments made during the debate would also be taken into consideration.

It was so decided.

The meeting rose at 12.55 p.m.